

Supreme Court, U. S.
FILED

SEP 26 1977

MICHAEL RODAN JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No.: 77-

77-468

EDWIN ALLEN GOOCH, III,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

**To the Supreme Court
Of the Commonwealth of Virginia**

Richard George Brydges
1369 Laskin Road
Virginia Beach, Virginia 23451
Attorney for the Petitioner

Commonwealth's Attorney
City of Chesapeake
Chesapeake, Virginia

TABLE OF CONTENTS

	<i>Page</i>
CITATION TO OPINION BELOW.....	1
JURISDICTION.....	1, 2
QUESTIONS PRESENTED.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2-4
STATEMENT OF CASE.....	4, 5
HOW THE QUESTION WAS RAISED AND DECIDED BELOW.....	4, 5
REASONS FOR GRANTING WRIT.....	5-7
CONCLUSION.....	7
CERTIFICATE.....	7
APPENDIX A - ORDER DENYING PETITION FOR WRIT.....	8
APPENDIX B - COMMUTATION OF SENTENCE....	9
APPENDIX C - TRANSCRIPT, PP. 395, 396.....	10-12

TABLE OF CASES

	<i>Page</i>
<i>Gregg v. Georgia</i> 44 U. S. L. W. 5230 (U. S. July 2, 1976)	6
<i>Jurek v. Texas</i> 44 U. S. L. W. 5262, 5264 (U. S. July 2, 1976)	6
<i>Roberts v. Louisiana</i> 63 So. 2nd 339	6
<i>Williams v. Oklahoma</i> 44 U. S. L. W. 3761 (U. S. July 6, 1976)	6
<i>Woodson v. North Carolina</i> 44 U. S. L. W. 5267 (U. S. July 2, 1976)	6

STATUTES

	<i>Page</i>
<i>Virginia Code Section 18.2-31</i> Code of Virginia, 1950, as amended	2, 4
<i>Virginia Code Section 53-228.1</i> Code of Virginia, 1950, as amended	6
<i>Article 5, §12, Constitution of Virginia</i>	3
<i>United States Constitution, VII Amendment</i> and XVI Amendment	4

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No.: 77-

EDWIN ALLEN GOOCH, III,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the Commonwealth of Virginia entered on June 27, 1977.

CITATION OF OPINION BELOW

The opinion of the Supreme Court of the Commonwealth, though not issued in written form, in Record Number 770256 of the records of the Supreme Court of Virginia, and is set out in Appendix A attached hereto at page 8, *infra*.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on June 27, 1977 and is set out in Appendix A hereto.

Jurisdiction of this Court is involved under §28 U. S. C. 1257 (3), petitioner having asserted below and asserting here deprivation of his rights as secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Did the trial court err in overruling the defendant's motion to quash the indictment under which the defendant was charged.
2. Did the trial court err in enforcing the Governor's order to commute the death penalty to the defendant to a life sentence prior to sentencing the defendant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Code of Virginia, 1952, as amended, §18.2-31:

"The following offenses shall constitute capital murder, punishable as a class one felony:

- (a) The willful, deliberate and premeditated killing of any person in the commission of abduction, as defined in §18.2-48, when such abduction was committed with the intent to extort money, or a pecuniary benefit;
- (b) The willful, deliberate and premeditated killing of any person by another for hire.
- (c) The willful, deliberate and premeditated killing of any person by an inmate in a penal institution, as defined in §53-19.8, or while in the custody of an employee thereof;
- (d) The willful, deliberate and premeditated killing of any person in the commission of a robbery while armed with a deadly weapon;

(e) The willful, deliberate and premeditated killing of any person during the commission of, or subsequent to rape; and

(f) The willful, deliberate and premeditated killing of a law enforcement officer as defined in §9-108 when such killing is for the purpose of interfering with performance of his official duties. (Code 1950, §18.1-21; §53-291; 1960, C. 358; 1962, C. 42; 1966, C. 300; 1970, C. 648; 1973, C. 403; 1975, CC. 14, 15; 1976, C. 503; 1977, C. 478.)

2. Code of Virginia, 1950 as amended, §53-228.1: "No pardon before conviction; commutation of capital punishment. The Governor shall not grant a pardon in any case before conviction. In any case in which he shall exercise the power conferred on him to commute capital punishment, he may issue his order to the superintendent of the penitentiary, requiring him to receive and confine (and the superintendent shall receive and confine) in the penitentiary according to such order, the person whose punishment is commuted. To carry into effect any commutation of punishment, the Governor may issue his warrant directed to any proper officer; and the same shall be obeyed and executed." (Code 1950, §19-271; Code 1950 (Repl. Vol. 1960), §19.1-297; 1960, C. 366; 1972, C. 145)

3. Constitution of Virginia, Article V, §12 — Executive Clemency.

The Governor shall have power to remit fines and penalties under such rules and regulations as may be prescribed by law; to grant reprieves and pardons after conviction except when the prosecution has been carried on by the House of Delegates; to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution; and to commute capital punishment.

He shall communicate to the General Assembly, at each regular session, particulars of every case of fine or penalty

remitted, of reprieve or pardon granted, and of punishment commuted, with his reasons for remitting, granting or commuting the same.

4. Constitution of the United States, Amendment VIII.

(Bails, Fines, Punishments)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

5. Constitution of the United States, Amendment XIV.

(Citizenship Rights not to be
Abridged by States)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**STATEMENT OF THE CASE
HOW QUESTION WAS RAISED
AND DECIDED BELOW**

The petitioner, Edwin Allen Gooch, III, was charged with hiring one Luther Beasley to kill the petitioner's wife in violation of §18.2-31 (b) of the Code of Virginia, 1950, as amended. A conviction under this statute requires the mandatory imposition of the death penalty.

The petitioner had a preliminary hearing in the General District Court of Chesapeake on February 18, 1976. The matter was certified to the Grand Jury and the defendant was subsequently indicted.

Prior to the trial by jury in the Circuit Court of the City of Chesapeake, the defendant moved to quash the indictment under which he was charged as being unconstitutional. The motions were overruled and the petitioner was subsequently found guilty on June 7, 1976. The sentencing of the petitioner was deferred until November 1, 1976, to allow both the prosecution and counsel to prepare briefs and argue certain attendant motions.

On October 20, 1976, prior to the Court passing sentence on the petitioner, the Honorable Mills Godwin commuted the petitioner's death sentence to life imprisonment. (See App. B. attached hereto). On November 1, 1976, the Court sentenced the petitioner to a life sentence pursuant to the Governor's order of commutation.

During the course of the trial, the main witness for the prosecution was Luther Beasley, who had admitted murdering the petitioner's wife. In an attempt to discredit Beasley's testimony, the defense called the investigating officer, Lt. McPherson, to testify. The defense asked the investigating officer if it was not a fact that the witness had changed his story. The prosecutor then asked if the witness had taken a lie detector test (See App. C. pages 395 and 396, transcript). Immediately thereafter, the defense moved for a mistrial which was overruled by the Court.

REASONS FOR GRANTING THE WRIT

The first basis for this petition for a writ of certiorari is that the petitioner was convicted under a constitutionally impermissible statute. Prior to the trial motions were made by the defense to quash the indictment under which the defendant was tried based on the statute involved being unconstitutional. All such motions were overruled and the petitioner was tried and found guilty.

Subsequent to the guilty verdict, but prior to the sentencing of the petitioner, this Court rendered a group of five

landmark decisions concerning the constitutionality of a mandatory death sentence. *Gregg v. Georgia*, 44, U.S.L.W. 5320; *Jurek v. Texas*, 44, U. S. L. W. 5262; *Roberts v. Louisiana*, 44, U. S. L. W. 5281; *Williams v. Oklahoma*, 44, U. S. L. W. 3761; *Woodson v. North Carolina*, 44, U. S. L. W. 5267. In these cases the Court very specifically stated that statutes which unequivocally require capital punishment for violation of one of a list of enumerated offenses is unconstitutional under the protection afforded by the Eighth and Fourteenth Amendments. Section 18.2-31 of the Code of Virginia, 1950, as amended, is identical to the statutes which have previously been held constitutionally impermissible by this Honorable Court.

It appears perfectly clear that the Court now requires a bifurcated proceeding prior to his sentencing but was denied same.

In the *Jurek* case, the Court specifically held that "individualized sentencing determination [is] . . . required by the Eighth and Fourteenth Amendments" and that "mandatory laws [imposing the death penalty are therefore] unconstitutional." *Jurek v. Texas*, 44, U. S. L. W. 5262, 5264 (U. S. July 2, 1976).

The second issue which the petitioner wishes to present to the Court is whether or not the Governor of the Commonwealth of Virginia had authority to commute the petitioner's sentence to one of life imprisonment. The Governor is given authority to commute capital punishment to life imprisonment under Article V, §12 of the Constitution of Virginia and under §53-228.1 of the Code of Virginia, 1950, as amended. However, in the case at bar, the defendant had not been sentenced on October 20, 1976, the date of the order commuting the sentence. In effect, there was no sentence to commute and the Governor lacked the legislative authority to take such action. The Governor's action usurped both legislative and judicial functions and denied the defendant his due process rights to a fair and impartial trial in its entirety.

CONCLUSION

Petitioner prays that the Petition for Writ be granted.

RICHARD GEORGE BRYDGES,
Attorney for the Petitioner

Richard George Brydges
1369 Laskin Road
Virginia Beach, Virginia 23451

CERTIFICATE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were hand delivered this 26th day of September, 1977 to the Office of the Commonwealth's Attorney for the City of Chesapeake, Virginia.

RICHARD GEORGE BRYDGES

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 27th day of June, 1977.

The petition of Edwin Allen Gooch, III, for a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Chesapeake on the 1st day of November, 1976, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

Record No. 770256

A Copy,

Teste:

Howard G. Turner, Clerk

By:

Ellen P. Tracy
Deputy Clerk

COMMONWEALTH OF VIRGINIA

EXECUTIVE DEPARTMENT

To All to Whom These Presents Shall Come - Greeting:

WHEREAS at a Circuit Court held in and for the City of Chesapeake in the month of June, in the year one thousand nine hundred and seventy-six,

EDWIN ALLEN GOOCH

was convicted of murder for hire and his punishment fixed at death by the jury:

THEREFORE I, Mills E. Godwin, Jr., Governor of the Commonwealth of Virginia, have, by virtue of authority vested in me, commuted and do hereby commute the said punishment so imposed to imprisonment in the Penitentiary for the term of life.

Given under my hand and under the Lesser Seal of the Commonwealth at Richmond, this 20th day of October, in the year of our Lord one thousand nine hundred and seventy-six, and in the 201st year of the Commonwealth.

Mills E. Godwin, Jr.
Governor of Virginia

By the Governor: *Patricia R. Price*
Secretary of the Commonwealth

APPENDIX C

LT. DAVID L. McPHERSON, recalled as a witness on behalf of the defendant, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION (Rec.)

BY MR. BRYDGES:

Q Lt. McPherson, you have been previously sworn and testified in this case?

A Yes, sir.

Q Can you answer one question for me: Do you recall in point of time Mr. Beasley changed his plea from not guilty or from the time that he denied any involvement in this crime to when he finally admitted that he killed Mrs. Gooch?

A I don't have the exact date, Mr. Brydges.

Q Approximately what time?

A It was possibly at least three weeks after his arrest.

MR. BRYDGES: All right, thank you, sir, that is all I have.

CROSS-EXAMINATION (Rec.)

BY MR. AXSON:

Q Had he been given a polygraph test?

MR. BRYDGES: If your Honor please, I object to that.

MR. AXSON: You called him as your witness.

MR. BRYDGES: If your Honor please, I object and ask for a mistrial.

May I be heard out of the presence of the jury.

THE COURT: All right. Ladies and gentlemen, step in the jury room, please.

(The jury were excluded from the courtroom.)

MR. BRYDGES: If your Honor please, we have been in this trial a day and a half, and now it has been suggested to the jury that Mr. Beasley took and passed a polygraph test, and Mr. Gooch's case is fatally prejudiced and I move the court —

MR. AXSON: There is no suggestion he took and passed a polygraph test.

THE COURT: I don't think that any results of it has been shown.

MR. BRYDGES: Oh, if your Honor please, I cannot possibly go on with this trial under these conditions, and I specifically —

THE COURT: All right. Let us take a recess. I am going to need some authority on it. I don't think at this point, it is the court's opinion at this point where I think that it was improper on the part of the Commonwealth to bring out the fact that there was a polygraph examination. I feel that sufficient explanation could be made to the jury that no results have been shown, and that he is a witness and not the defendant.

MR. AXSON: That is right.

THE COURT: I don't think it is proper to show that ever a witness has been submitted to it, but I don't think that it's prejudicial error. But I will allow — we have very limited authorities here — I have Corpus Juris Secundum here, AmJur is in the law library in a separate building, and the Virginia Reports are here. I don't

recall any Virginia cases right on point, but you might be able to find something.

MR. BRYDGES: If your Honor please, I only called the witness for one statement. The evidence is that he was saying in jail that he did this thing the day he was in there and I wanted to know at what point in time it was when he finally admitted it officially, and I asked him nothing about any polygraph.

MR. AXSON: I want to show why he made the statement. He wants to put in the fact that he made a statement three weeks later and I want to show why, and I submit I have a reason.

THE COURT: I am going to have to see some authority on it, but I think this is a case of great magnitude and a very serious case and I don't want to jeopardize the defendant's rights. But I don't think at this point that what has been done it is necessary for the court to declare a mistrial. I think if there is any error that it can be corrected by instructions to the jury.

We will take a recess and you may look into those.

MR. BRYDGES: All right, sir.

THE COURT: The court stands in recess.

(The court recessed at 11:15 a.m. After recess the trial proceeded as follows:)

THE COURT: You have no further corss-examination?